RECEIVED
JUL 1 1982
OFFICE OF THE CLERK
SUPREME COURT U.S.

82 5001
No. 81-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM ALVIN SMITH,

Petitioner,

-against-

STATE OF GEORGIA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Stephen H. Glickman
Counsel of Record
ZUCKERMAN, SPAEDER, TAYLOR & KOLKER
1201 Connecticut Avenue, N.W.
Twelfth Floor
Washington, D.C. 20036
202/775-1440

Counsel for Petitioner

QUESTION PRESENTED

Whether in a capital case the Sixth, Eighth and Fourteenth Amendments to the Constitution forbid the exclusion of a veniremen on the ground that because of his conscientious scruples he would not vote to impose the death penalty under any circumstances, (1) where the exclusion is based on the mistaken belief that it was required by this Court in Witherspoon v. Illinois, 391 U.S. 510 (1968), (2) where the jury ultimately selected was instructed that regardless of the facts it found it could reject the death penalty for any reason whatsoever or for no reason, and (3) where the excluded juror would have been fully able to obey the law, the court's instructions, and his oath?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinion Below	1
Jurisdiction	1
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	13
Appendix	
Opinion of the Supreme Court of Georgia	1a
Transcript of Voir Dire Examination of Excluded Juror John W. Monk	12a
Instructions of Trial Court Concerning Penalty	17a

TABLE OF AUTHORITIES

Cases

	Page
*Adams v. Texas, 448 U.S. 38 (1980)	passim
Boulden v. Holman, 394 U.S. 478 (1969)	5
Cobb v. State, 244 Ga. 344, 260 S.E.2d 60 (1979)	5
Davis v. Georgia, 429 U.S. 122 (1976)	5,7
Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 869 (1982)	12
Furman v. Georgia, 408 U.S. 238 (1972)	11
Lockett v. Ohio, 438 U.S. 586 (1978)	5
Maxwell v. Bishop, 398 U.S. 262 (1970)	5
Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978)	5
Taylor v. Louisiana, 419 U.S. 522 (1976)	8
Trop v. Dulles, 356 U.S. 86 (1958)	12
*Witherspoon v. Illinois, 391 U.S. 510 (1968)	passim
Woodson v. North Carolina, 428 U.S. 280 (1976)	8

---

* Indicates cases chiefly relied upon

Constitutional Provisions and Statutes

	Page
United States Constitution Sixth Amendment	i,2,6,8
United States Constitution Eighth Amendment	i,2,8
United States Constitution Fourteenth Amendment	i,2,6
Ga. Code Ann. §27-2538	4
The Georgia Unified Appeal Procedure	4

No. 81-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM ALVIN SMITH,

Petitioner

-against-

STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

OPINION BELOW

The decision of the Supreme Court of Georgia is appended to this petition at 1a. It is reported at ____ Ga. ____, 290 S.E.2d 43 (1982).

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on April 6, 1982. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides in relevant part.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed....

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law....

STATEMENT OF THE CASE

Petitioner William Alvin Smith was tried, convicted and sentenced to death by a jury in a bifurcated proceeding in the Superior Court of Oglethorpe County, Georgia, for the murder and armed robbery of one Daniel Lee T er. Petitioner now seeks a writ of certiorari from this Cou he Supreme Court of Georgia to review that court's affirma f his conviction and sentence.

The selection of petitioner's jury which gave rise to the question presented in this case occurred on September 14, 1981. Following a group voir dire by panels, the veni were examined individually by the court on their attit toward capital punishment. Each prospective juror was ask specifically whether he was "conscientiously opposed to capital punishment." Only those jurors who indicated oppo- sition were questioned further. One such juror, John W. Mor , was excluded by the court, over petitioner's counsel's objec tion, because of his beliefs. App. 12a - 16a.

Initially, this juror said that he had "mixed emotions" about capital punishment, and simply did not know whether h could vote for the death penalty. App. 13a. He also sa that his convictions would not prevent him from rendering a verdict of guilty. After considerable further inquiry by the court, Mr. Monk concluded that "right at this time" there were no circumstances he could think of under which he would vote to impose the death penalty. App. 14a - 15a. On request of the district attorney, the court excused Mr. Monk from serving.

In response to the objection of petitioner's counsel, the court stated that under Witherspoon v. Illinois, 391 U.S. 510 (1968), it had "a duty to excuse" this venireman. App. 15a - 16a.

As previously mentioned, petitioner was found guilty after the first phase of his trial, and additional evidence was then presented concerning the State's request for the death penalty. The court then instructed the jury that if it found the proffered aggravating circumstance beyond a reasonable doubt, it was authorized but not required to impose death, App. 19a. Rather, the court charged, the sentence the jury then imposed "is a matter entirely within your discretion and you may provide for a life sentence for this accused for any reason that is satisfactory to you or without any reason if you care to do so." App. 19a.

After deliberating approximately forty minutes, the jury returned with a sentence of death. The Supreme Court of Georgia upheld both conviction and sentence. App. 1a.

In capital cases where the death penalty is imposed, the Georgia Supreme Court reviews "each of the assertions of error timely raised by the defendant during the proceedings in the trial court regardless of whether or not an assertion of error was presented to the trial court by motion for new trial, and regardless of whether error is enumerated in the [Georgia] Supreme Court." The Georgia Unified Appeal Procedure, Part IV (B)(2), Appendix to Chapter 27-25, following Ga. Code Ann. §27-2538 (Supp. 1981). Thus, although petitioner's counsel on appeal did not brief or argue the question presented here,

he did not thereby waive the claim of error. The Georgia Supreme Court stated in its opinion that "[a]s provided for by the Unified Appeal Procedure, we have reviewed independently the record and transcript and find no significant potential of error other than those enumerated by the appellant." App. 6a-7a. Accordingly the court did not discuss in its opinion the question presented here. Prior decisions of the Georgia Supreme Court had already rejected similar claims of unconstitutional exclusion of death-scrupled jurors, on the authority of Witherspoon. E.g., Cobb v. State, 244 Ga. 344, 260 S.E.2d 60, 66 (1979); Potts v. State, 241 Ga. 67, 243 S.E.2d 510, 514-515 (1978).

REASONS FOR GRANTING THE WRIT

As the sheer number of this Court's decisions following Witherspoon v. Illinois attests,[1/] the exclusion of prospective jurors in capital cases because of their conscientious scruples against the death penalty raises important federal questions. One of those questions is presented here -- whether it is constitutional to exclude for cause veniremen who are so opposed to capital punishment that they would refuse to vote for the death penalty in any case. This question, of immense significance to the conduct of capital cases throughout the United States, has never been definitively resolved by this

---

1/ E.g. Adams v. Texas, 448 U.S. 38 (1980); Lockett v. Ohio, 438 U.S. 586, 595-596 (1978); Davis v. Georgia, 429 U.S. 122 (1976); Maxwell v. Bishop, 398 U.S. 262 (1970); Boulden v. Holman, 394 U.S. 478 (1969).

Court. In Adams v. Texas, 448 U.S. 38 (1980), however, this Court strongly implied that such "death-qualification" of jurors would indeed be unconstitutional, at least under circumstances in which the excluded jurors would have been able to obey the law, the trial court's instructions, and their oaths. Although those circumstances obtain in Georgia, one such juror was excluded, on the mistaken belief that Witherspoon so required, from petitioner's trial. Consistent with its previous decisions, the Georgia Supreme Court recognized no error in this exclusion. Because this petition presents an important federal question, and because the position of the courts below on that question was based on a misreading of Witherspoon and conflicts with the reasoning of Adams v. Texas, this Court should grant the writ.

In Witherspoon v. Illinois, this Court held that under the Sixth and Fourteenth Amendments, "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522. Further, the Court said that a venireman may not be excluded for cause even if he indicates that there are some kinds of cases in which he would absolutely refuse to recommend capital punishment -- and even though the very case before him may appear to be one of those kinds. 391 U.S. at 522 n.21. The Court left open the possibility of exclusion in only two situations, saying:

> [N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

391 U.S. at 522-523 n.21. The exclusion of veniremen who refuse to vote for the death penalty in any kind of case was not, however, at issue in Witherspoon, and the Court expressly reserved judgment on the constitutionality of that practice.[2/]

Following Witherspoon, this Court had numerous opportunities to reaffirm its uncompromising holding that nothing short of either a juror's unequivocal refusal to impose the death penalty in any case or a juror's inability to follow the law would justify exclusion of that juror.[3/] In Davis v. Georgia, 429 U.S. 122 (1976), the Court held that the exclusion of even one juror in violation of the Witherspoon standards sufficed to invalidate a death sentence subsequently imposed. In Adams v. Texas, the latest case in which this Court has addressed the propriety of juror death-qualification, the Court held the Witherspoon standards fully applicable to

---

2/ The Court not only emphasized that this issue was not before it, 391 U.S. at 513-514, but also declared specifically that nothing it said had any bearing on the question, 391 U.S. at 522-523 n.21. See also Adams v. Texas, 448 U.S. at 47-48.

3/ See the cases cited in footnote 1, supra.

bifurcated trials for capital offenses conducted under the Texas death penalty statute. It is clear after Adams and Davis that Witherspoon's vitality is unimpaired. To date, however, the propriety of the exclusion of veniremen who would not impose death in any case -- the question on which this Court reserved judgment in Witherspoon -- has remained unresolved.

Significantly, however, in Adams v. Texas, this Court in effect explained and reinterpreted Witherspoon so as to cast the most serious doubt on the validity of such an exclusion, at least in the circumstances of petitioner's trial.[4/] In Adams the Court said that the line of cases since Witherspoon

> establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

4/ Other developments in Sixth and Eighth Amendment jurisprudence during the interval between Witherspoon and Adams also contribute to undermining the constitutional validity of death-qualification of jurors in capital cases. These developments include the establishment of the Sixth Amendment right to juries impartially drawn from a representative cross-section of the community, Taylor v. Louisiana, 419 U.S. 522, 528 (1976), and the recognition that to comply with the Eighth Amendment, capital juries must be able to exercise their guided discretion in accordance with contemporary community values, Woodson v. North Carolina, 428 U.S. 280, 295 (1976) (plurality opinion).

448 U.S. at 45. The Court explained that the two situations in which Witherspoon left open the possibility of exclusion were consistent, in the particular circumstances of that case, with "the State's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths":

> For example, a juror would no doubt violate his oath if he were not impartial on the question of guilt. Similarly, the Illinois law in effect at the time Witherspoon was decided required the jury at least to consider the death penalty, although it accorded the jury absolute discretion as to whether or not to impose it. A juror wholly unable even to consider imposing the death penalty, no matter what the facts of a given case, would clearly be unable to follow the law of Illinois in assessing punishment.

448 U.S. at 44. Nonetheless, the Court emphasized in Adams, "it is clear beyond peradventure that Witherspoon is not a ground for challenging any prospective juror." 448 U.S. at 47-48. Rather, under Witherspoon as interpreted in Adams, the rule is clear that "if prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out." 448 U.S. at 48.

The exclusion at petitioner's trial of prospective juror John W. Monk clearly offended this uncompromising standard. Monk was excluded not by operation of any State law, but rather on the erroneous understanding that Witherspoon so required.[5/] App. 16a. There was no indication from his

---

5/ There is no explicit requirement in Georgia law that jurors in capital cases even be willing to consider the death penalty.

voir dire that Monk would have any difficulty obeying his oath or following the court's instructions. To the contrary, Monk affirmed that he would have no trouble rendering a verdict of guilty if the evidence warranted it. App. 13a. Nor would Monk's principles have been an obstacle to his performance of his responsibilities during the penalty phase of petitioner's trial. For petitioner's jury was specifically instructed, in accordance with Georgia law, that even if it found beyond a reasonable doubt the statutory aggravating circumstance which would permit it to impose the death penalty, it would be under no obligation whatsoever to do so. Rather, the court charged that the sentence the jury then imposed would remain entirely within its discretion; and that the jury could still provide for a life sentence for any reason whatsoever or even without any reason if it cared to do so. App. 19a. Had Monk been asked during his voir dire whether he could follow this instruction or any of the other instructions actually given, he obviously could have answered yes. Given this instruction, Monk's scruples would not have impaired his ability to decide impartially any question of fact, including for instance the existence of any statutory aggravating circumstance on which a death penalty might depend. He could then have refused to impose that penalty because of his conscientious objections and still have remained fully obedient to the law as charged by the court. Indeed, there is an inherent contradiction in excluding a prospective juror, because of his thoughtful objection to the death penalty on the highest moral grounds, when each juror who

is permitted to serve is then solemnly instructed that regardless of the evidence he may reject the death penalty for any or no reason whatsoever.[6/] No legitimate interest of the State is served by such an illogical approach to jury selection in capital cases.[7/]

Moreover, the death-qualification of jurors gravely impairs the fundamental role the sentencing jury plays in a capital case. As this Court said in Witherspoon and has reiterated since, "a jury that must choose between life imprisonment and capital punishment can do little more -- and must do nothing less -- than express the conscience

---

6/ Furthermore, it is difficult to reconcile the exclusion of a juror like Monk when, as this Court said in Witherspoon, 391 U.S. at 522 n.21, jurors who would absolutely refuse to impose capital punishment in some (but not all) general categories of cases for which that punishment is authorized cannot be excluded.

7/ At most, the State can assert an interest in obtaining a jury that will "obey the law" and impose the death penalty in every "appropriate" case. But, under the death penalty statutes of Georgia and most other states, a juror "obeys the law" and determines whether or not the case before him is an "appropriate case" for capital punishment by exercising a discretion which, though guided, necessarily responds to the juror's own attitudes and principles regarding fit punishment as much as to the facts of the case. A venireman with conscientious and principled, even inflexible, scruples against the death penalty is not incapable of complying with the law under such a statutory scheme. For principled opposition to the death penalty takes a variety of forms. Any juror who considers a case and concludes that it does not warrant the extreme penalty is -- unless he acts in the wholly arbitrary and capricious manner forbidden by Furman v. Georgia, 408 U.S. 238 (1972) -- acting pursuant to some principle of broader or narrower scope which decrees that death is not an acceptable punishment in the case. The State does not purport to dictate the contours of the governing principle; it does not, and constitutionally cannot, require

[Continued on next page]

of the community on the ultimate question of life or death."

391 U.S. at 519. Amplifying this language, the Court explained:

> [O]ne of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system -- a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."

391 U.S. at 519 n.15, quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). The systematic exclusion from jury service in capital cases of members of the community

---

7/ [Continued]
the death penalty in any case; and, while it may offer the juror some non-mandatory guidelines, and may even forbid the application of the death penalty unless certain facts (i.e., "aggravating cumstances") are found, it does not (and, once again, it constitutionally cannot) undertake to limit the juror's plenary authority to spare the defendant in any case or according to any principle. See Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 869, 874 (1982). How then can the State tax a venireman with failure or inability to obey the law merely because the venireman acts, or says that he will act, according to the broadest principle, and will spare the defendant in every case since neither that case nor any other merits capital punishment in his view? This venireman's judgment that the present case does not warrant a death sentence is no less responsible, no less considered, and no less obedient to the law, for being responsive to the particular principle which he follows. Obviously, his conclusion that the death penalty should never be imposed embraces the judgment that it should not be imposed in the case at bar; and the latter judgment is one that the State leaves jurors free to make in the uninhibited exertion of any other principle or none at all.

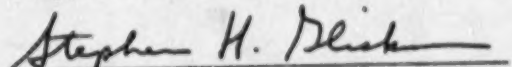
because they have thought seriously on capital punishment and reject it as inconsistent with their highest moral values threatens to sever the "link" of which this Court spoke, seriously limiting the ability of the juries which are chosen to reflect the "conscience of the community."

From the foregoing, it is evident that the death-qualification of petitioner's jury raises an unresolved federal question of the utmost importance to the administration of capital punishment schemes throughout the United States. The position of the courts below was premised on a mistaken conception of Witherspoon, and is inconsistent with the reasoning of Adams. For these reasons, it is imperative that this Court grant petitioner's request and resolve the question presented.

CONCLUSION

For the reasons stated herein, petitioner requests that the writ of certiorari be granted.

Respectfully submitted,



Stephen H. Glickman
ZUCKERMAN, SPAEDER, TAYLOR & KOLKER
1201 Connecticut Avenue, N.W.
Twelfth Floor
Washington, D.C. 20036
202/775-1440

Counsel for Petitioner

DATED: July 2, 1982